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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1420

VERA TEPERICH, Petitioner

vs

NORTH JUDSON-SAN PIERRE HIGH SCHOOL BUILDING CORPORATION and NORTH JUDSON-SAN PIERRE SCHOOL CORPORATION, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

VERA TEPERICH, Petitioner

vs

NORTH JUDSON-SAN PIERRE HIGH SCHOOL BUILDING CORPORATION and NORTH JUDSON-SAN PIERRE SCHOOL CORPORATION, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The petitioner, Vera Teperich, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Indiana Supreme Court entered in this proceeding on December 8, 1971.

OPINION BELOW

The opinion of the Supreme Court of Indiana, reported at 275 N.E. 2d 814, appears in Appendix "A" hereto. No opinion was rendered by the Starke Circuit Court.

JURISDICTION

The judgment and opinion of the Supreme Court of Indiana was entered on December 8, 1971. A timely petition for rehearing was denied on February 2, 1972, Appendix "B", and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the device here used to obviate the Con-

stitution of the State of Indiana is so repugnant that Plaintiff's Fourteenth Amendment, due process and equal protection rights, are violated.

2. Whether the determination that the annual rental payments on a lease contract between the two respondents are not debts so departs from accepted judicial decisions that the United States Supreme Court should review this cause.

CONSTITUTIONAL PROVISIONS INVOLVED

Article XIII, Section 1, of the Constitution of the State of Indiana states:

> No political or municipal corporation in this State shall ever become indebted in any manner or for any purpose to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporations, shall be void: Provided, That in time of war, foreign invasion, or other great public calamity, on petition of a majority of the property owners, in number and value, within the limits of such corporation, the public authoritles, in their discretion, may incur obligations necessary for the public protection and defense, to such an amount as may be requested in such petition.

STATEMENT OF THE CASE

On March 22, 1971, North Judson-San Pierre Schools, an Indiana school corporation (hereinafter called School Corporation) and the North Judson-San Pierre High School Building Corporation (hereinafter called Building Corporation) entered into a contract whereby the Building Corporation became obligated to build a new high school and to "lease" the new school to the School Corporation for 22 years at an annual rental rate of $278,000.00.

The "lease" is found in Appendix "C". Under the terms of the said "lease", after 6 years from the date of the lease and prior to the expiration thereof, the School Corporation may purchase the new school for the capital actually invested by the Building Corporation. If, at any time, the School Corporation fails to pay the annual rental payments, the Building Corporation can either require specific performance of the contract or can terminate the interest of the School Corporation.

The members of the School Corporation are appointed and not elected. The members of the Building Corporation are likewise appointed and not elected. The taxpayers of the School Corporation, under Indiana law, do not have the right to vote on whether or not a new school should be constructed. Under Indiana law, the School Corporation, having determined that a new school is needed, forms a building corporation and transfers a real estate site to the building corporation. The building corporation, a not-for-profit corporation, using school corporation funds, hires an architect to design the school. After the school is designed, the lease is prepared and the public can remonstrate before the State Board of Tax Commissioners if the public feels the school is not necessary or otherwise unlawful. To the best of petitioner's knowledge, the Tax Commissioners have never overruled the School Board's determination of necessity.

On April 20, 1971, remonstrances against the lease were filed with the Starke County Auditor and transmitted to the State Board of Tax Commissioners. On July 16, 1971, the State Board of Tax Commissioners found against the remonstrance. On August 16, 1971, petitioner filed a complaint in the Starke Circuit Court seeking to enjoin the School Corporation and the Building Corporation from operating under the terms of the lease agreement dated March 22, 1971, and to prevent the Building Corporation from selling the bonds necessary to finance the construction of a proposed school building. On August 20, 1971, the Starke Circuit Court, after a hearing on the Building and School Corporations' petition to dismiss or post bond, ordered the cause dismissed unless this petitioner filed a $200,000.00 bond within 10 days. The bond could not be posted so an appeal was taken to the In-

diana Supreme Court and on December 8, 1971, the Supreme Court of Indiana held that the annual rental payment is not a debt because the payments are made in advance; the opinion being found in Appendix "A".

The total assessed valuation of the School Corporation was $16,498,445.00 on July 29, 1971. There is an existing lease agreement dated May 3, 1965, between the North Judson-San Pierre School Building Corporation and the North Judson-San Pierre Schools to rent a school for a term of 20 years with option to purchase, at an annual payment of $60,000.00 per year. The $60,000.00 annual payment plus the $278,000.00 annual payment is more than 2% of the assessed valuation of the school corporation. More than 2% of the taxable property of the school corporation will have to be collected each year to pay the annual payments.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE DEVICE HERE USED TO OBVIATE THE CONSTITUTION OF THE STATE OF INDIANA IS SO REPUGNANT THAT PLAINTIFF'S DUE PROCESS AND EQUAL PROTECTION RIGHTS ARE VIOLATED.

Where a device is used as a subterfuge, Plaintiff's due process and equal protection rights are violated. It is obvious that the "lease" is really a conditional sales contract. Paragraph 8 of the "lease" reads as follows:

> 8. *Option to Purchase.* Lessor hereby grants to Lessee the right and option, on any rental payment date, from and after six (6) years from the date of the execution of this lease and prior to the expiration thereof, upon written notice to Lessor, to purchase the demised premises *at a price equal to the amount required to enable Lessor to liquidate by paying all indebtedness,* including all premiums payable on the redemption thereof and accrued and unpaid interest, by redeeming and retiring all stock at par, and by paying the expenses and charges of liquidation. *In no event, however, shall*

such purchase price exceed the capital actually invested in such property by Lessor represented by outstanding securities or existing indebtedness plus the cost of transferring the property and liquidating the Lessor corporation. The phrase "capital actually invested" as used herein shall be construed to include, but not by way of limitation, the following amounts expended by the Lessor; organization and incorporation expenses, financing costs, carrying charges, legal fees, architects' fees, contractors' fees and reasonable costs and expenses incidental thereto.

If the Lessee exercises its option to purchase, it shall pay to the Trustee referred to above that portion of the purchase price which is required to pay all indebtedness of Lessor, including all premiums payable on the redemption thereof and accrued and unpaid interest. Such payment shall not be made until the Trustee gives to Lessee a written statement that such amount will be sufficient to retire all outstanding indebtedness of Lessor secured by the trust agreement or agreements between the Trustee and the Lessor, including all premiums payable on the redemption thereof and accrued and unpaid interest.

The remainder of such purchase price shall be paid by the Lessee to the Lessor. Nothing herein contained shall be construed to provide that Lessee shall be under any obligation to purchase the demised premises, or under any obligation in respect to any creditors, shareholders, or security holders of Lessor.

Upon request of the Lessee, the Lessor agrees to furnish an itemized statement setting forth the amounts required to be paid by the Lessee on the next rental payment date in order to purchase the demised premises in accordance with the preceding paragraph. The statement shall also set forth

the name of the Trustee under the trust agreement or agreements securing the outstanding indebtedness of the Lessor (emphasis added).

The Building Corporation, being a not-for-profit corporation, cannot possibly retain the building after a 22 year period. The option to purchase for the actual capital invested shows that the lease is a mere subterfuge.

The State of California has correctly interpreted the law so that no due process violation is present. In *Los Angeles v. Offner,* 19 Cal. 2d 484, 122 P. 2d 14 (1942), the Supreme Court of California held that:

> If a lease is entered into a good faith and creates no immediate indebtedness for the aggregate installments provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional debt limitation. If however, the instrument creates a full and complete liability upon its execution, or if its designation as a "lease" is a subterfuge and it is actually a conditional sales contract in which the rentals are installments paid on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void.

The 14th Amendment to the Constitution of the United States dictates that no State shall deprive any person of life, liberty, or property, without due process of law nor deny any person equal protection of the laws. Where a State abuses its authority by upholding such a subterfuge there is a violation of the 14th Amendment. The State has permitted a discrimination to exist and cannot show that such discrimination is necessary to preserve a compelling state interest. The discrimination is giving words abnormal meaning to suit the specific purpose. Where a person such as this petitioner is taxed, without representation (the school board is appointed and there is no referendum on the bond sale) and when

the obvious purpose of the legislature is to obviate the State Constitution, the United States Supreme Court must act.

II. THE DETERMINATION THAT THE ANNUAL RENTAL PAYMENTS ON A LEASE CONTRACT BETWEEN THE TWO RESPONDENTS ARE NOT DEBTS SO DEPART FROM ACCEPTED JUDICIAL DECISIONS THAT THE UNITED STATES SUPREME COURT SHOULD REVIEW THIS CAUSE.

The unquestioned interpretation of Article XIII, Section I, of the Constitution of the State of Indiana, cited in full above, is that a municipal corporation may not become "indebted in any manner or for any purpose to an amount in the aggregate exceeding two per centum of the value of the taxable property within such corporation".

The Indiana Legislature of 1947 adopted the Schoolhouse Holding Corporation Act, Burns' Ind. Statutes Ann. 28-3901(ff) for the sole purpose of obviating the clear language of Article XIII, Section I of the Indiana Constitution. The judgment and opinion of the Supreme Court of Indiana has now eliminated any limitation over new school construction in the State of Indiana. The school board here in question is appointed and there is no referendum on the bond issue to build the new school. The school board can tax without limitation and without control.

The petitioner here is saying that the word "debt" must be given its normal meaning. The Supreme Court of Indiana has given the word "debt" an abnormal meaning, a meaning not possibly contemplated by the drafters of the Indiana Constitution.

The Indiana Supreme Court stated:

> Without regard to the amount of the rental payments, they cannot be considered debt until the payments become due. If they are paid out of funds available at that time then no debt liability arises. It is clearly the rule in this State that municipal corporations may contract for services over a period of years and agree to pay for such services

in periodic installments as the service is furnished. Where such service is paid for only upon the furnishing of that service no debt is incurred when the payments are made from current revenues. . . Rental of school facilities is of the same nature. The contract covers an extended period of time and the service (providing school facilities) is paid for as received. The lease contains an abatement of rent clause which states that if the premises are destroyed in whole or in part such as to render them unfit for use in whole or in part, the rent will be abated in proportion to the percentage of the area which is unfit. Thus, even though the rent is paid in advance, if the services are not received for any time during that period, the school corporation will receive a refund and will not be required to make any future rental payments so long as the premises cannot be used. Debt is not incurred until services are earned. . .Thus as long as the rental payments are made in advance out of current revenues, no debt would be incurred. If at any time the services of providing school facilities is not so provided the school corporation is under no obligation to pay. On the other hand, *if the school facilities were financed through a school corporation bond issue the school corporation would be obligated to pay regardless of the fact the facilities could no longer be utilized.* . .It is self-evident that rental of facilities to furnish space for education is an ordinary expense for a school corporation. If paid from revenues currently available it is not a "debt" within the meaning of the Constitution, but is merely an ordinary expense. (emphasis added).

The Supreme Court of Indiana has overlooked paragraph 10 of the "lease" which reads as follows:

10. *Defaults.* If the Lessee shall default in the payment of any rentals or other sums payable to the Lessor hereunder, or in the payment of any other sum herein required to be paid for the Lessor, or

in the observance of any other covenant, agreement or condition hereof, and such default shall continue for ninety (90) days after written notice to correct the same, then, in any or either of such events, the Lessor may proceed to protect and enforce its rights by suit or suits in equity or at law in any court of competent jurisdiction, whether for *specific performance* of any covenant or agreement contained herein, or for the enforcement of any other appropriate legal or equitable remedy, or the Lessor, at its option, without further notice, may *terminate the estate* and interest of the Lessee hereunder, and it shall be lawful for the Lessor forthwith to resume possession of the demised premises and the Lessee covenants to surrender the same forthwith upon demand.

The exercise by the Lessor of the above right to terminate this lease shall not release the Lessee from the performance of any obligation hereof maturing prior to the Lessor's actual entry into possession. No waiver by the Lessor of any right to terminate this lease upon any default shall operate to waive such right under the same or other default subsequently occurring. (emphasis added).

The net effect of the language in paragraph 10 of the "lease" is that the School Corporation can be obligated to pay the annual payment regardless of the fact that the facilities are no longer used.

Secondly, the Indiana Supreme Court has overlooked the normal meaning of the word "debt", as determined in previous decisions.

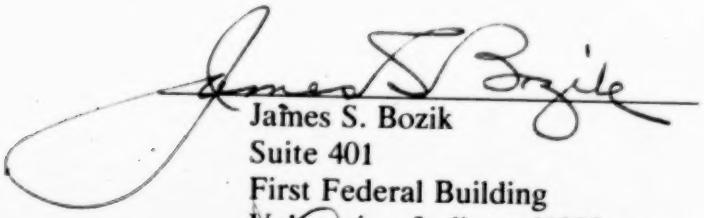
A "debt" is a "specified sum of money owing to one person from another, including not only the obligation of the debtor to pay but the right of the creditor to receive and enforce payment". *Angola Brick & Tile Co. v. Millgrove School Twp.*, (1920), 73 Ind. App. 557, 127 N.E. 2d 855. The School Corporation in this case has an obligation, and the Building Corporation by its option to terminate the lease for

default of payment or demand specific performance, has the right to receive and enforce the payment.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Indiana Supreme Court.

Respectfully submitted,



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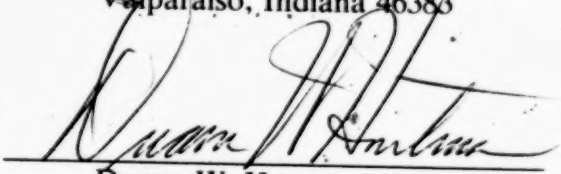

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APPENDIX "A"

IN THE

SUPREME COURT OF INDIANA

VERA TEPERICH as Taxpayer and/or Citizen of North-Judson-San Pierre School Corporation,

Appellant,

v.

No. 871S232

NORTH JUDSON-SAN PIERRE HIGH SCHOOL BUILDING CORPORATION, Arthur Selmer, President, and Marshall Teallow, Secretary; NORTH JUDSON-SAN PIERRE SCHOOL CORPORATION, Leo Seghetti, President, and Glenn Wallace, Secretary,

Appellees.

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable James J. Richards, Special Judge

HUNTER, J.

This is an appeal from an interlocutory order of the Starke Circuit Court pursuant to IC 1971, 34-4-17-5, (Ind. Ann. Stat. §3-3305 [1968 Repl.]), ordering appellant, Vera Teperich, to post a two hundred thousand dollar ($200,000) bond or have her suit dismissed.

On August 16, 1971, appellant filed a complaint against the North Judson-San Pierre High School Building Corporation and others, seeking to enjoin them from operating un-

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On November 15 the Chief Justice signed an order advancing this cause on the docket for consideration and disposition. November 23, 1971, the case was assigned to this office. Opinion on this case was distributed to the Court on December 2nd.

der the terms of a lease agreement dated March 22, 1971, and to prevent them from selling the bonds necessary to finance the construction of a proposed school building. On August 17, 1971, the appellees waived service of summons and appeared and answered the complaint. At that time, appellees filed a petition to have this cause declared a public lawsuit as defined by IC 1971, 34-4-17-1, (Ind. Ann. Stat. § 3-3301 [1968 Repl.]). Appellees also petitioned for an order of the court requiring that the cause be dismissed unless the appellant posts bond.

Upon the court's determination that the cause constituted a public lawsuit, appellant promptly filed a Motion for Change of Venue from the Judge. The parties stipulated, and this Court appointed, the Honorable James J. Richards as Special Judge. On August 20, 1971, after a hearing on appellees' Petition to Dismiss or Post Bond, the order issued from which the appellant has appealed.

The following allegations of error have been presented to this Court on appeal:

1. The Court erred in determining that this is a public lawsuit and ordering a bond to be posted or the cause dismissed.

2. The Court erred, assuming arguendo, that this is a public lawsuit, in not making specific findings of fact.

3. The Court erred, assuming arguendo, that this is a public lawsuit, in not finding that the amended rental payments to the two holding corporations are debts and as debts exceed the two percent limitation of Article 13, Section 1 of the Constitution of the State of Indiana.

Appellant contends that the Indiana Rules of Procedure have abolished the procedure governing public lawsuits set forth in IC 1971, 34-4-17-5, (Ind. Ann. Stat. §3-3305 [1968 Repl.]), which reads as follows:

> "At any time prior to the final hearing in a public lawsuit, the defendant may petition for an

order of the court that the cause be dismissed unless the plaintiff shall post a bond with surety to be approved by the court payable to defendant for the payment of all damages and costs which may accrue by reason of the filing of the lawsuit in the event the defendant prevails. A hearing shall be had on such petition in the same manner as the hearing on temporary injunctions under Acts 1881 (Spec. Sess.) c. 38. If at the hearing the court determines that the plaintiff can not establish facts which would entitle him to a temporary injunction, the court shall set the amount of bond to be filed by the plaintiff in an amount found by the judge to cover all damage and costs which may accrue to the defendants by reason of the pendency of the public lawsuit in the event the defendant prevails. In the event such bond is not filed by the plaintiff with sureties approved by the court within ten (10) days after such order is entered the suit shall be dismissed. Either plaintiff or defendant may appeal such order to the Indiana Supreme Court within such ten (10) day period by notice of appeal and a statement of error in the same manner as is provided in a petition for mandate or prohibition. The Supreme Court may stay the lower court order pending its own decision, may set a bond to be filed by the plaintiff in connection therewith, may modify the order of the lower court, or may enter its order as a final order in a case. In the event no bond is filed as provided in this section the public lawsuit shall be dismissed and no court shall have further jurisdiction of the public lawsuit or any other public lawsuit involving any issue which was or could have been raised therein."

Appellant relies primarily on TR. 1 of the Indiana Rules Procedure to support her contention that the procedure prescribed by IC 1971, 34-4-17-5, (Ind. Ann. Stat. § 3-3305 [1968 Repl.]), no longer controls. TR. 1 provides:

"Except as otherwise provided, these rules

> govern the procedure and practice in all courts of the state of Indiana in all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin. They shall be construed to secure the just, speedy and inexpensive determination of every action."

Appellant has overlooked, however, TR. 65 (E), relating to injunctions, which reads, in part, as follows:

> "Nothing in this rule shall affect provisions of statutes extending or limiting the power of a court to grant injunctions. *By way of example* and not by way of limitation, *this rule shall not affect the provisions of 1967 Indiana Acts, ch. 357, §§ 1-8* [Burns' Stat., §§ 3-3301—3-3308 (Repl. 1968)] relating to public lawsuits. . ." [our emphasis]

Therefore, the trial court did not err in proceeding with the interlocutory hearing as provided by IC 1971, 34-4-17-5, (Ind. Ann. Stat. §3-3305 [1968 Repl.]), as this action clearly falls within the definition of a public lawsuit as defined by IC 1971, 34-4-17-1, (Ind. Ann. Stat. §3-3301 [1968 Repl.]).

Appellant next argues that the trial court erred in not making specific findings of fact as required by TR. 52(A). With this contention we agree.

IC 1971, 34-4-17-5, (Ind. Ann. Stat. § 3-3305 [1968 Repl.]), provides that the plaintiff, at the interlocutory hearing, must establish facts sufficient to entitle him to a temporary injunction. TR. 52(A) provides that the court *shall make special findings of fact without request in granting or refusing preliminary injunctions.* It follows, therefore, that the trial court should have made special findings of fact before ordering the cause dismissed or bond posted. See, *Johnson v. Tipton Community School Corporation* (1970), _____ Ind. _____, _____, 255 N.E. 2d 92, 96 (Dictum).

However, we fail to see how this error was harmful or prejudicial to appellant. The facts in this case are relatively simple and are not in dispute. Thus it cannot be seriously contended that appellant has been uninformed as to what

facts were determined or that she has been prejudiced by not being able to adequately prepare this appeal.

The next question is whether plaintiff established facts sufficient to entitle her to a temporary injunction. If such facts were not established then it was correct for the judge to require the posting of a bond. No question is raised as to the amount of the bond required.

It is clear that, according to the law in Indiana, facts were not sufficiently established and the judgment of the trial court must be affirmed. Plaintiff questions the validity of a lease agreement entered into by the North Judson-San Pierre School Corporation contending the annual lease payment is a "debt" of the Corporation and when added to the other debt obligations of the Corporation exceeds the limitation on debt of two percent (2%) of the taxable property of the school corporation in violation of Article XIII, Section 1 of the Constitution of the State of Indiana. Art. XIII, §1 reads:

> "No political or municipal corporation in this State shall ever become indebted in any manner or for any purpose to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporations, shall be void: Provided, That in time of war, foreign invasion, or other great public calamity, on petition of a majority of the property owners, in number and value, within the limits of such corporation, the public authorities, in their discretion, may incur obligations necessary for the public protection and defense, to such an amount as may be requested in such petition."

Without regard to the amount of the rental payments, they cannot be considered debt until the payments become due. If they are paid out of the funds available at that time

then no debt liability arises. It is clearly the rule in this State that municipal corporations may contract for services over a period of years and agree to pay for such services in periodic installments as the service is furnished. Where such service is paid for only upon the furnishing of that service no debt is incurred when the payments are made from current revenues. *Town of Gosport v. Pritchard* (1901), 156 Ind. 400, 59 N.E. 1058; *Board of Commissioners v. Gardner* (1900), 155 Ind. 165, 57 N.E. 908; *City of Laporte v. Gamewell Fire Alarm Telegraph Co.* (1896), 146 Ind. 466, 45 N.E. 588; *Seward v. Town of Liberty* (1895), 142 Ind. 551, 42 N.E. 39; *Foland v. Town of Frankton* (1895), 142 Ind. 546, 41 N.E. 1031; *Crowder v. Town of Sullivan* (1891), 128 Ind. 486, 28 N.E. 94; *City of Valparaiso v. Gardner* (1884), 97 Ind. 1. Rental of school facilities is of the same nature. The contract covers an extended period of time and the service (providing school facilities) is paid for as received. The lease contains an abatement of rent clause which states that if the premises are destroyed in whole or in part such as to render them unfit for use in whole or in part, the rent will be abated in proportion to the percentage of the area which is unfit. Thus, even though the rent is paid in advance, if the services are not received for any time during that period, the school corporation will receive a refund and will not be required to make any future rental payments so long as the premises cannot be used. Debt is not incurred until services are earned. *City of South Bend v. Reynolds* (1900), 155 Ind. 70, 57 N.E. 706. Thus, as long as the rental payments are made in advance out of current revenues, no debt would be incurred. If at any time the service of providing school facilities is not so provided the school corporation is under no obligation to pay. On the other hand, if the school facilities were financed through a school corporation bond issue the school corporation would be obligated to pay regardless of the fact that the facilities could no longer be utilized. It was stated in *City of South Bend v. Reynolds*, supra:

> "It is settled in this State that if a city contracts for water, light, or other things which pertain to its ordinary and necessary expenses, and agrees to

pay for the same annually or monthly as furnished, such contract does not create an indebtedness for the aggregate sum of all the annual or monthly payments, because the debt for each year or month does not come into existence until it is earned." 155 Ind. at 72, 57 N.E. at 707.

The Court goes on to say:

> "It is evident that rent for suitable offices, for the officers of a city, is as much an ordinary and necessary expense as the expense for water and light. . . and that when the city agrees to pay the rent for said offices annually or monthly, the contract does not create an indebtedness for the amount of all the annual or monthly payments. While the rent for suitable offices for city officers is an ordinary and necessary expense, the erection of a city hall, or a building for the use of the city officers, is not in any sense an ordinary and necessary expense, but is an extraordinary one. . .There is a clear and plain distinction between a contract for the use of rooms or a building for city purposes and the erection by the city of a building to be used for such purposes. The one is an ordinary and necessary expense, while the other involves municipal ownership of the building or rooms, the means of furnishing the offices, and is an extraordinary expense." 155 Ind. at 73, 57 N.E. at 707-708.

It is self-evident that rental of facilities to furnish space for education is an ordinary expense for a school corporation. If paid from revenues currently available it is not a "debt" within the meaning of the Constitution, but is merely an ordinary expense.

This Court held in *Book v. State Office Building Commission* (1958), 238 Ind. 120, 149 N.E. 2d 273, that no part of the lease rental payments constituted debt for the current year; that the departments of the state could lease space in the state office building without incurring debt in violation of Art. X, §5 of the Indiana Constitution which provides:

"No law shall authorize any debts to be contracted, on behalf of the State, . . ."

There is language contained in *Book v. Indianapolis-Marion Building Authority* (1955), 234 Ind. 250, 258, 126 N.E. 2d 5, 9, indicating that an annual rental payment would be debt but this statement was dicta framed in terms of a hypothetical example. We do not feel this language is controlling, especially in light of the other case law in this State which, as indicated above, is contrary to this language.

Clearly rent-lease payments cannot be considered debt until earned, and if the payments are made in advance out of presently available revenues no debt liability is incurred. The North Judson-San Pierre School Corporation must only make payments so long as the facilities are in fact available for the use to which they were intended. It is therefore no different than contracting for any other service for a period of years payable in periodic installments, and, as long as funds are available to make the payments out of current revenues, such contracts have overwhelmingly been held to be valid and not violative of Art. XIII, §1 of the Indiana Constitution. See, *Town of Gosport v. Pritchard,* supra; *Board of Commissioners v. Gardner,* supra; *City of Laporte v. Gamewell Fire Alarm Telegraph Co.,* supra; *Seward v. Town of Liberty,* supra; *Foland v. Town of Frankton,* supra; *Crowder v. Town of Sullivan,* supra; *City of Valparaiso v. Gardner,* supra; *City of South Bend v. Reynolds,* supra. There was no showing at the hearing that the School Corporation would not have sufficient funds on hand to make the payments as they arose and therefore the Judge was correct in holding that the plaintiff failed to establish sufficient facts to entitle her to a temporary injunction and in requiring plaintiff to post bond as provided in the statute.

For all the foregoing reasons, the judgment of the trial court granting appellees' petition and setting appellant's bond at two hundred thousand dollars ($200,000) is affirmed.

Judgment affirmed.

Arterburn, C.J., DeBruler, Givan and
Prentice, JJ. Concur.

APPENDIX "B"

No. 871 S 232

Vera Teperich

vs

North Judson-San Pierre High School Bldg. Corp.

You are hereby notified that the Supreme Court has on this day DENIED petition for rehearing-Hunter, A.C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 2nd day of February, 1972

/s/ Billie R. McCullough
Clerk Supreme and Appellate Courts

APPENDIX "C"

LEASE

THIS LEASE, entered into this 22nd day of March, 1971, between North Judson-San Pierre High School Building Corporation, an Indiana corporation (hereinafter called "Lessor"), and North Judson-San Pierre Schools, an Indiana school corporation existing under the laws of the State of Indiana and located in Starke County (hereinafter called "Lessee"),

WITNESSETH THAT:

In consideration of the mutual covenants herein contained, it is agreed that:

1. *Premises, Term and Warranty.* The Lessor does hereby lease, demise and let to Lessee the real estate in Starke County, Indiana, more particularly described in Exhibit A attached hereto and made a part hereof, and a school building to be erected thereon by Lessor according to plans and specifications dated December 22, 1970, prepared for the Lessor by Fanning & Howey, Inc., architects of Celina, Ohio, together with such changes or modifications therein which are approved by the Lessor and Lessee in writing and do not alter the character of the building nor reduce the value thereof and any additional improvements made to such real estate and equipment purchased by Lessor for such school building. The above mentioned plans and specifications have been filed with and approved by Lessee.

TO HAVE AND TO HOLD the same with all rights, privileges, easements and appurtenances thereunto belonging, unto Lessee, for a term of twenty-two (22) years, beginning on the date the building above referred to is completed and ready for occupancy, and ending on the day prior to such date twenty-two (22) years thereafter. The date the building is completed, ready for occupancy, shall be endorsed on this lease at the end hereof by the parties hereto as soon as the same can be done after such completion, and such endorsement shall be recorded as an addendum to this lease. The Lessor hereby represents that it is possessed of, or will acquire, a good and indefeasible estate in simple to

the above described real estate, and Lessor warrants and will defend the same against all claims whatsoever not suffered or caused by the acts or omissions of Lessee or its assigns.

2. *Semi-Annual Rental Payments.* The Lessee agrees to pay rental for said premises at the rate of Two Hundred Seventy-eight Thousand Dollars ($278,000.00) per year during the term of this lease. The first rental installment shall be due on the day that the building to be erected on the premises is completed and ready for occupancy, in an amount which provides for rental at the yearly rate specified above from the date of completion until the first June 1st or December 1st following such date of completion. Thereafter, such rental shall be payable in advance in semi-annual installments of One Hundred Thirty-nine Thousand Dollars ($139,000.00) on June 1st and December 1st of each year. The last semi-annual rental payment due before the expiration of this lease shall be adjusted to provide for rental at the yearly rate specified above from the date such installment is due to the date of the expiration of this lease. All rentals payable under the terms of this lease shall be paid by the Lessee to American State Bank, in the Town of North Judson, Indiana, as Trustee, or to such other bank or trust company as may from time to time succeed American State Bank as Trustee under the Trust Indenture securing the first mortgage bonds to be issued by the Lessor. All payments so made by the Lessee shall be considered as payment to the Lessor of the rentals payable hereunder.

3. *Additional Rental Payments.* The Lessee shall pay as further rental for said premises all taxes and assessments levied against or on account of the leased property. Any and all such payments shall be made and satisfactory evidence of such payments in the form of receipts shall be furnished to the Lessor by the Lessee, at least three (3) days before the last day upon which the same must be paid to avoid delinquency. In case the Lessee shall in good faith desire to contest the validity of any such tax or assessment, and shall so notify the Lessor, and shall furnish bond with surety to the approval of the Lessor conditioned for the payment of the

charges so desired to be contested and all damages or loss resulting to the Lessor from the non-payment thereof when due, the Lessee shall not be obligated to pay the same until such contests shall have been determined.

4. *Abatement of Rent.* In the event the building to be erected on the premises shall be partially or totally destroyed, whether by fire or any other casualty, so as to render the same unfit, in whole or part, for use and occupancy by the Lessee, it shall then be the obligation of the Lessor to restore and rebuild the building as promptly as may be done, unavoidable strikes and other causes beyond the control of the Lessor excepted; *provided, however,* that the Lessor shall not be obligated to expend on such restoration or rebuilding more than the amount of the proceeds received by the Lessor from the insurance provided for in Clause 6 hereof.

If there is in force on the date of such partial or total destruction insurance on the demised premises and the rental value thereof, in accordance with the provisions of Clause 6 hereof, the rent shall be abated for the period during which the school building or any part thereof is unfit for occupancy and shall be in proportion to the percentage of floor area which is unfit for occupancy.

5. *Alterations and Repairs.* The Lessee assumes all responsibility for repairs and alterations to the school building to be constructed by the Lessor. No alterations shall be made by Lessee without first obtaining the written consent of Lessor. At the end of the term, Lessee shall deliver the leased property to Lessor in as good condition as at the beginning of the term, reasonable wear and tear only excepted. Equipment or other personal property which becomes worn out or obsolete may be discarded or sold by Lessee. Lessee need not replace such personal property, but may replace such property at its own expense, which replacement property shall belong to Lessee. The proceeds of the sale of any personal property shall be deposited with the Trustee to be applied on the lease rental. Lessee may trade in any obsolete or won out personal property on replacement property which will belong to Lessee without making a deposit with the Trustee.

6. *Insurance.* Lessee, at its own expense, will, during the full term of the lease, keep the demised premises insured against physical loss or damage, however caused, with such exceptions as are ordinarily required by insurers of buildings or facilities of a similar type, in good and responsible insurance companies to the approval of Lessor. Such insurance shall be in an amount equal to one hundred five per cent (105%) of the full replacement cost of the leased facilities as certified by a registered architect, registered engineer, or professional appraisal engineer, selected by the Lessor, on the effective date of this lease and on or before the first day of April of each year thereafter. Such appraisal may be based upon a recognized index of conversion factors. During the full term of this lease Lessee will also, at its own expense, maintain rent or rental value insurance in an amount equal to the full rental value of the leased facilities for a period of two (2) years against physical loss or damage of the type insured against pursuant to the preceding requirements of this clause. Such policies shall be for the benefit of persons having an insurable interest in the demised premises, and shall be made payable to the Lessor or to such other person or persons as the Lessor may designate. Such policies shall be countersigned by an agent of the insurer who is a resident of the State of Indiana, and such policies, together with a certificate of the insurance commissioner certifying that the persons countersigning such policies are duly qualified in the State of Indiana as resident agents of the insurers on whose behalf they may have signed, and the certificate of the architect or engineer hereinbefore referred to shall be deposited with the Lessor. If, at any time, the Lessee fails to maintain insurance in accordance with this clause, such insurance may be obtained by the Lessor and the amount paid therefor shall be added to the amount of rental payable by the Lessee under this lease; *provided, however,* that the Lessor shall be under no obligation to obtain such insurance and any action or non-action of the Lessor in this regard shall not relieve the Lessee of any consequence of its default in failing to obtain sueh insurance, including its obligation to continue the rental payments in cause of total or partial destruction of the building as provided in Clause 4 hereof.

7. *General Covenants.* The Lessee shall not assign this lease or sublet the demised premises herein described without the written consent of the Lessor. Lessee shall use and maintain the demised premises in accordance with the laws and ordinances of the United States of America, the State of Indiana, and all other proper governmental authorities.

8. *Option to Purchase.* Lessor hereby grants to Lessee the right and option, on any rental payment date, from and after six (6) years from the date of the execution of this lease and prior to the expiration thereof, upon written notice to Lessor, to purchase the demised premises at a price equal to the amount required to enable Lessor to liquidate by paying all indebtedness, including all premiums payable on the redemption thereof and accrued and unpaid interest, by redeeming and retiring all stock at par, and by paying the expenses and charges of liquidation. In no event, however, shall such purchase price exceed the capital actually invested in such property by Lessor represented by outstanding securities or existing indebtedness plus the cost of transferring the property and liquidating the Lessor corporation. The phrase "capital actually invested" as used herein shall be construed to include, but not by way of limitation, the following amounts expended by the Lessor: organization and incorporation expenses, financing costs, carrying charges, legal fees, architects' fees, contractors' fees and reasonable costs and expenses incidental thereto.

Upon request of the Lessee, the Lessor agrees to furnish an itemized statement setting forth the amounts required to be paid by the Lessee on the next rental payment date in order to purchase the demised premises in accordance with the preceding paragraph. The statement shall also set forth the name of the Trustee under the trust agreement or agreements securing the outstanding indebtedness of the Lessor.

If the Lessee exercises its option to purchase, it shall pay to the Trustee referred to above that portion of the purchase price which is required to pay all indebtedness of Lessor, including all premiums payable on the redemption thereof and accrued and unpaid interest. Such payment shall not be made until the Trustee gives to Lessee a written state-

ment that such amount will be sufficient to retire all outstanding indebtedness of Lessor secured by the trust agreement or agreements between the Trustee and the Lessor, including all premiums payable on the redemption thereof and accrued and unpaid interest.

The remainder of such purchase price shall be paid by the Lessee to the Lessor. Nothing herein contained shall be construed to provide that Lessee shall be under any obligation to purchase the demised premises, or under any obligation in respect to any creditors, shareholders, or security holders of Lessor.

9. *Option to Renew.* Lessor hereby grants to Lessee the right and option to renew this lease for a further like, or lesser, term upon the same or like conditions as herein contained, and Lessee shall exercise this option by written notice to Lessor given upon any rental payment date prior to the expiration of this lease.

10. *Defaults.* If the Lessee shall default in the payment of any rentals or other sums payable to the Lessor hereunder, or in the payment of any other sum herein required to be paid for the Lessor, or in the observance of any other covenant, agreement or condition hereof, and such default shall continue for ninety (90) days after written notice to correct the same, then, in any or either of such events, the Lessor may proceed to protect and enforce its rights by suit or suits in equity or at law in any court of competent jurisdiction, whether for specific performance of any covenant or agreement contained herein, or for the enforcement of any other appropriate legal or equitable remedy, or the Lessor, at its option, without further notice, may terminate the estate and interest of the Lessee hereunder, and it shall be lawful for the Lessor forthwith to resume possession of the demised premises and the Lessee covenants to surrender the same forthwith upon demand.

The exercise by the Lessor of the above right to terminate this lease shall not release the Lessee from the performance of any obligation hereof maturing prior to the Lessor's actual entry into possession. No waiver by the Lessor of any right to terminate this lease upon any default shall

operate to waive such right under the same or other default subsequently occurring.

11. *Notices.* Whenever either party shall be required to give notice to the other under this lease, it shall be sufficient service of such notice to deposit the same in the United States mail, in an envelope duly stamped, registered and addressed to the other party or parties at their last known place of business.

12. *Successors or Assigns.* All covenants of this lease, whether by Lessor or Lessee, shall be binding upon the successors and assigns of the respective parties hereto.

13. *Construction of Covenants.* Lessor was organized for the purpose of constructing and erecting a school building and leasing the same to Lessee under the provisions of Chapter 273 of the Acts of the Indiana General Assembly for the year 1947, and all acts amendatory thereof or supplemental thereto. All provisions herein contained shall be construed in accordance with the provisions of said Act as amended, and to the extent of inconsistencies, if any, between the covenants and agreements in the lease and the provisions of said Act, the provisions of said Act shall be deemed to be controlling and binding upon Lessor and Lessee.

IN WITNESS WHEREOF, the parties hereto have caused this lease to be executed for and on their behalf the day and year first hereinabove written.

NORTH JUDSON-SAN PIERRE HIGH SCHOOL BUILDING CORPORATION

By */s/ Arthur Selmer*

Arthur Selmer President

Attest:

/s/ Marshall Teallow

Marshall Teallow Secretary

LESSOR

NORTH JUDSON-SAN PIERRE SCHOOLS

By */s/ Leo Seghetti*

Leo Seghetti President

Board of School Trustees

Attest:

/s/ Glenn Wallace

Glenn Wallace Secretary

Board of School Trustees

LESSEE

STATE OF INDIANA

SS:

COUNTY OF STARKE

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared Arthur Selmer and Marshall Teallow, personally known to me to be the President and Secretary respectively of North Judson-San Pierre High School Building Corporation, and acknowledged the execution of the foregoing lease for and on behalf of said Corporation.

WITNESS my hand and notarial seal this 22nd day of March, 1971.

/s/ Opal M. Heilman

Opal M. Heilman, Notary Public

My commission expires
January 4, 1974.

STATE OF INDIANA

SS:

COUNTY OF STARKE

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared Leo Seghetti and Glenn Wallace, personally known to me to be the President and Secretary respectively of the Board of School Trustees of North Judson-San Pierre Schools, and acknowledged the execution of the foregoing lease for and on behalf of said school corporation.

WITNESS my hand and notarial seal this 22nd day of March, 1971.

/s/ Opal M. Heilman

Opal M. Heilman, Notary Public

My commission expires
January 4, 1974.

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Supreme Court, U. S.
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MAY 23 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1420

VERA TEPERICH, Petitioner

vs

NORTH JUDSON-SAN PIERRE HIGH SCHOOL BUILDING CORPORATION and NORTH JUDSON-SAN PIERRE SCHOOL CORPORATION

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Orville W. Nichols, Jr.
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Telephone (219) 772-2900

Attorney for Respondents

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

STATEMENT OF THE CASE--CORRECTED

In the petitioner's Statement of the Case, she states that the North Judson-San Pierre High School Building Corporation (hereinafter called Building Corporation) is a not-for-profit corporation. The record does not disclose whether the building corporation is a not-for profit corporation or a for-profit corporation. However, it was formed as a corporation for profit and not as a not-for-profit corporation. This correction of the statement of the case is

not relevant to the decision of the Court.

REASONS FOR DENYING THE WRIT

1. THE SUPREME COURT OF THE UNITED STATES MUST ACCEPT THE STATE COURT'S CONSTRUCTION OF A STATE STATUTE.

The Supreme Court of the United States has consistently followed the rule that it will accept the state court's construction of the constitutionality of the state statutes under the state constitution and has held that the interpretation of the state supreme court of the constitutionality of a state statute is the final adjudication.

In Highland Farms Dairy v Agnew, (1937), 300 U.S. 608, 81 L.Ed. 835, 57 S.Ct. 549, Justice Cardoza stated at page 840 of 81 L.Ed.,

> "A judgment by the highest court of the state as to the meaning and effect of its own constitution is decisive and controlling everywhere."

See also, Hunter v Pittsburgh, (1907), 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151.

Thus, the decision of the Indiana Supreme Court finding that the Schoolhouse Building Act does not violate Article XIII, Sec. 1 of the

Constitution of the State of Indiana is conclusive upon the Supreme Court of the United States.

II. THE PETITIONER RAISED NO FEDERAL QUESTION IN EITHER THE TRIAL COURT OR IN THE INDIANA SUPREME COURT AND THEREFORE THE SUPREME COURT OF THE UNITED STATES WILL NOT DECIDE ANY CONSTITUTIONAL QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI.

The failure of the petitioner to raise any federal questions, either in the trial court or in the Supreme Court of Indiana precludes the Supreme Court of the United States from considering this Petition for Writ of Certiorari. In Edelman v People of the State of California, (1952), 73 S.Ct. 293, 344 U.S. 357, 97 L.Ed. 387, Justice Clark held that the federal questions were not properly presented in the record and therefore, the Supreme Court of the United States did not have jurisdiction to hear the case. See also, cases cited under notes of decisions under Title 28 U.S.C.A., Sec. 1257, Nos. 290, 292, 293 and 294.

Recognizing this rule of law, Rule 23 (f) of the Rules of United States Supreme Court requires that the petition for writ of certiorari set forth:

> "The stage of the proceedings in the court of first instance and in the appellate court at which and the manner in which the federal questions thought to be re-

viewed were raised; the method of raising them * * *; and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record or summary thereof with specific reference to the places in the record where the matters appear * * * as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

The petitioner has failed to comply with Rule 23 (f) for the reason that the questions were never presented, either in the trial court or in the Supreme Court of Indiana.

III. THE DECISION OF THE SUPREME COURT OF INDIANA IS CORRECT AND IN CONFORMITY WITH THE PRIOR DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

In Walla Walla v Walla Walla Water Company, (1898), 172 U.S. 1, 43 L. Ed. 341, the Supreme Court of the United States recognized the problems connected with municipal debt and at page 349, 43 L.Ed., Justice Brown stated the law to be as follows:

"But we think the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary, and may

stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as, by the issue of railway bonds or for the erection of a public improvement, --though such debt be payable in the future by instalments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed.

"In the case under consideration the annual rental did not become an indebtedness within the meaning of the charter until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all, and while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation. Wood v Partridge, 11 Mass. 488, 493. A different construction might be disastrous to the interests of the city,

since it is obviously debarred from purchasing or establishing a plant of its own exceeding in value the limited amount, and is forced to contract with some company which is willing to incur the large expense necessary in erecting waterworks upon the faith of the city paying its annual rentals."

The Walla Walla decision is in conformity with the decision in this case in the Supreme Court of Indiana.

As to the contentions set forth in the petitioner's brief that school boards are required to be elected and the contention in the petitioner's brief that the public has a right to vote on whether or not monies shall be appropriated and spent for new school buildings, this Court has disposed of those contentions in Ohio ex rel Bryant v Akron Metropolitan Park District, (1930), 281 U. S. 74, 74 L. Ed. 710. The State of Ohio had passed a statute which created a park district, provided that the park commissioners were to be appointed by the probate judge, that the park commissioners were to have power to acquire land, create parkways, parks and other reservations of land, they were authorized to lay assessments upon specially benefited lands and were authorized to levy taxes upon all taxable property within the district up to one mill.

In disposing of the contention that the law was unconstitutional in violation of the 14th Amendment to the Constitution of the United States,

the Court held that the question had not been preserved, and as to the guarantee of a republican form of government the Court held at page 715, 74 L. Ed. as follows:

> "As to the guaranty to every state of a republican form of government (Sec. 4, art. 4), it is well settled that the questions arising under it are political, not judicial, in character and thus are for the consideration of the Congress, and not the courts."

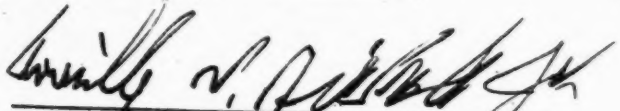
CONCLUSION

If the contention of the Petitioner were accepted, this would destroy and make void millions of dollars worth of school building corporation bonds now outstanding in the State of Indiana. The common method of financing school construction at the present time is for the school corporation to issue its general obligation bonds for a part of the school construction, and then to enter into a lease with a school building corporation for another part of the school construction, or additional school construction. The general obligation bonds are outstanding, together with the school building corporation bonds. The legislature has provided a system of review as to whether or not the school corporation needs the school building, or whether or not the proposed lease is unnecessary, or unwise. or that the lease rental is not fair or reasonable by providing for a review upon remonstrance by the State Board of Tax Commissioners, Burns, Indiana Statutes Annotated, Section 28-3907.

Where obligations are incurred by municipalities in violation of Article 13, Section 1 of the Constitution of Indiana, the obligations are not enforceable. Also, taxpayers would be authorized to bring an action to prevent the payment of obligations in excess of 2% of the assessed valuation. LaPorte v Gamewell Fire Alarm Tel. Co., (1896), 146 Ind. 466, 45 N.E. 588, 35 L.R.A. 686, 58 Am. St. 359, Caldwell v Bauer, (1913), 179 Ind. 146, 99 N.E. 117, Angola Brick & Tile Co. v Millgrove School Tp., (1920), 73 App. 557, 127 N.E. 855.

Thus, for the reasons above given, the Supreme Court of the United States should deny the Petition for Writ of Certiorari in this cause.

Respectfully submitted,



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